(12)

No. 90-1424

Supreme Court, U.S.
FILED
OCT 3 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS L. SANSONETTI
Solicitor
Department of the Interior
Washington, D.C. 20240

TABLE OF AUTHORITIES

Cases: Page

Allen v. *Wright*, 468 U.S. 737 (1984) 11
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 15
Astoria Fed. Sav. & Loan Ass'n v. *Solimino*, 111 S. Ct. 2166 (1991) 20
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 13
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) .. 17
EEOC v. *Arabian American Oil Co.*, 111 S. Ct. 1127 (1991) 13, 15
Environmental Defense Fund v. *Massey*, Civ. No. 91-1068 (D.D.C. Aug. 29, 1991) 19
Foley Bros., Inc. v. *Filardo*, 336 U.S. 281 (1949) .. 14
Diamond v. *Charles*, 476 U.S. 54 (1986) 7
Hagans v. *Lavine*, 415 U.S. 528 (1974) 11
Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 12
Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986) 7, 11
Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 9
Lujan v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990) 2, 3, 4, 6, 7, 12
Mendaro v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983) 4
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 12
NRDC v. *NRC*, 647 F.2d 1345 (D.C. Cir. 1981) 20
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 17
Poller v. *CBS, Inc.*, 368 U.S. 464 (1962) 2
Rust v. *Sullivan*, 111 S. Ct. 1759 (1991) 7
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 2
TVA v. *Hill*, 437 U.S. 153 (1978) 18, 19
United States v. *SCRAP*, 412 U.S. 669 (1973) 6
United States v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) 11
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 7, 12

Cases—Continued: Page

Warth v. *Seldin*, 422 U.S. 490 (1975) 12
Whitmore v. *Arkansas*, 110 S. Ct. 1717 (1990) 9

Constitution, statutes and rule:

U.S. Const. Art. III 1, 5, 12
Administrative Procedure Act, 5 U.S.C. 702 ..... 10, 11, 12
Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. 1502 4
Endangered Species Act, 16 U.S.C. 1531 *et seq.*:
16 U.S.C. 1531(a)(4) 14, 15, 19
16 U.S.C. 1531(b) 5
16 U.S.C. 1532(7) 4
16 U.S.C. 1532(9) (§ 3(9)) 16
16 U.S.C. 1533(§ 4) 12, 14
16 U.S.C. 1533(b)(1)(A) 14
16 U.S.C. 1533(b)(2) 14
16 U.S.C. 1536(§ 7) 6, 8, 10, 12, 13, 14, 17, 19, 20
16 U.S.C. 1536(a)(2) (§ 7(a)(2)) 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20
16 U.S.C. 1536(g)(1) 15
16 U.S.C. 1536(g)(2)(B) 15
16 U.S.C. 1536(n) 15
16 U.S.C. 1536(o) (§ 7(o)) 15
16 U.S.C. 1536(b)(4)(iv) 15
16 U.S.C. 1536(b)(4)(h) 15
16 U.S.C. 1537(a) 16
16 U.S.C. 1537(b) 18
16 U.S.C. 1538(a)(1) 15
16 U.S.C. 1538(a)(1)(B) 15
16 U.S.C. 1538(a)(1)(C) 15
16 U.S.C. 1538(a)(1)(E) 16
16 U.S.C. 1538(a)(1)(F) 16
16 U.S.C. 1540(g)(1)(A) 12
16 U.S.C. 1540(g)(1) 12
16 U.S.C. 1540(g)(1)(C) 12
Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, Tit. I, 102 Stat. 2306-2307 17
Magnuson Fishery Conservation and Management Act, § 101, 16 U.S.C. 1811 16

Statutes and rule—Continued: Page

5 U.S.C. 103 5
22 U.S.C. 262m *et seq.* 5
22 U.S.C. 286 *et seq.* 5
33 U.S.C. 1369(b) 13
42 U.S.C. 7607(b) 13
Fed. R. Civ. P. 56(e) 4

Miscellaneous:

Hearings on H.R. 37 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93d Cong., 1st Sess. (1973) 16
H.R. Rep. No. 714, 99th Cong., 2d Sess. (1986) 17
Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) 16
S. Rep. No. 307, 93d Cong., 1st Sess. (1973) 17-18

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We have shown in our opening brief (at 16-31) that respondents failed to satisfy bedrock Article III standing requirements. As a consequence, the court below construed Section 7(a)(2) of the Endangered Species Act (ESA) in the context of an abstract dispute over an interpretative regulation, far removed from any concrete controversy about a specific overseas project. We have also shown (Gov't Br. 31-50) that the court of appeals' holding that Section 7(a)(2) governs projects in foreign countries is contrary to the presumption against extraterritorial application of Acts of Congress, is unsupported by the text or legislative history of the ESA, and disregards principles of deference to administrative interpretation. Respondents and amici offer no persuasive defense of the standing and extraterritoriality rulings below.

I. A. Respondents' argument serves only to highlight the extent of the court of appeals' departure from set-

tled standing doctrine. They begin by misstating (Br. 18) the posture of the case and the applicable standard of review. The district court did not render any "factual findings," as respondents claim. It granted summary judgment for respondents without identifying any evidence that would support standing, because it erroneously believed that the court of appeals had *already* resolved the standing issue against the Secretary when it reversed the district court's dismissal of the complaint. Pet. App. 24a-25a. That ruling was inconsistent with *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990), and respondents do not defend it here. Furthermore, the "clearly erroneous" standard of review respondents invoke (Br. 18) would not apply even if the district court had made factual findings. A court must "look at the record on summary judgment in the light most favorable to * * * the party opposing the motion." *Poller* v. *CBS, Inc.*, 368 U.S. 464, 473 (1962); see *Lujan*, 110 S. Ct. at 3186, 3188. The record here, far from entitling *respondents* to summary judgment, required the district court to enter judgment for the Secretary on standing. See Gov't Br. 18-29.

Respondents likewise do not defend the court of appeals' holding (Pet. App. 10a-11a, 42a-44a) that they have standing based on a supposed "procedural injury" that results when an action agency fails to initiate consultation with the Secretary about a particular project, even if none of respondents' members have a "geographical nexus" to the project itself. See Pet. Br. 35 n.10. We have explained (Gov't Br. 29-30) the flaws in that reasoning, and respondents make no contention to the contrary.

B. Because respondents no longer contend that a "procedural injury" is sufficient—and because respondents do not have standing based on their own organizational interests in wildlife, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972)—they were required to identify individual members who satisfy established standing criteria. Yet respondents did not show any actual or threatened injury to any of their members as a result of U.S. funding of a project abroad, much less injury that could fairly be

traced to the Secretary's regulation or that would be redressed by a court-ordered revision of that regulation.

1. In attempting to show injury-in-fact, respondents rely (Br. 18-26) on the activities of five of their members. The court of appeals relied on two of those five (Joyce Kelly and Amy Skilbred), Pet. App. 8a-9a n.2, and we have demonstrated (Gov't Br. 19-23) that it erred in doing so. The court of appeals itself held that a third member lacked standing, and the remaining two had such a remote connection to overseas projects that the court below did not even bother to mention them.

Joyce Kelly. Respondents did not show that Kelly suffered any injury that could be traced to assistance rendered by the Bureau of Reclamation to the Aswan Dam project, which involved rehabilitation of turbines. Respondents state (Br. 22) that the project will "affect" the habitat of the Nile crocodile, including the (unspecified) area Kelly visited in 1986. But they do not describe any impact on the crocodiles, and they simply cite Kelly's affidavit, which did no more than assert that she would "suffer harm" because of the project (J.A. 101), without specifying how. In fact, Kelly's knowledge of the project apparently derived entirely from the Bureau's publication *Water for the World*, which does not suggest that it would have any effect on crocodiles or their habitat. J.A. 65. Thus, Kelly's affidavit plainly was insufficient under *Lujan*, 110 S. Ct. at 3189, to survive the Secretary's motion for summary judgment.

Amy Skilbred. Skilbred visited the vicinity of the Mahaweli Project in Sri Lanka in 1981-1982, well before she joined Defenders. Respondents do not dispute our submission (Gov't Br. 21) that Skilbred failed to link her generalized concerns about the project to animals in the particular area she visited (which she did not identify) or in the particular project unit that was to receive funds from the Agency for International Development (AID). Instead, respondents rely (Br. 23) on a 1986 article in Defenders' own magazine (J.A. 95) for the proposition that the project will harm certain species. Putting to one

side the self-serving and unsworn nature of this source (see Fed. R. Civ. P. 56(e)), the article likewise fails to link any such harm to particular areas.

Moreover, although respondents quote (Br. 23) a passage in a 1980 letter from the Fish and Wildlife Service (FWS) to AID stating that the Mahaweli Project "could have" massive environmental impacts (J.A. 215), they fail to note that the same letter acknowledged that AID had funded an environmental assessment for the entire project, furnished technical assistance to the Sri Lankan Government on endangered species and other environmental matters, and consulted with FWS in doing so. J.A. 215-216; see also J.A. 78-80, 210-216. FWS also stated that the project "could be a showcase to developing nations on how to develop their potential resources with minimum impact to the environment and wildlife," J.A. 216, and AID worked with Sri Lanka to establish new nature reserves and protect species in the area and was commended by the World Wildlife Fund for doing so. Gov't Br. 22 n.12. In light of these mitigation measures taken years earlier in consultation with FWS, there is no support for the presumption the court of appeals implicitly indulged (contrary to *Lujan*, 110 S. Ct. at 3189) that still further consultation with FWS would have some incremental effect on the project or animals.

Finally, respondents note (Br. 22) Skilbred's visit to a World Bank-funded project in Brazil. But, as both courts below correctly held (Pet. App. 44a, 61a n.6), the World Bank is not a "federal agency" whose actions are governed by domestic U.S. laws like the ESA; it is an international organization, established by international agreement.[1]

---

[1] See Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. 1502; 22 U.S.C. 286 *et seq.*; *Mendaro* v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983). Respondents concede (Br. 20 n.3) that the World Bank is not a federal agency as such. But since the ESA defines "federal agency" to mean "any department, agency, or instrumentality of the United States," 16 U.S.C. 1532(7), they erroneously contend (Br. 20 n.3) that the World Bank is an "instrumentality" of the

J. Campbell Plowden. Not even the court of appeals found Plowden's testimony sufficient to support standing; this is hardly surprising, since Plowden "came only within several hundred miles" of the AID-assisted Picchis-Palcazu Project in Peru. Pet. App. 9a n.2; Gov't Br. 7 n.2. Respondents contend (Br. 27-28) that Plowden nonetheless has standing because the place he visited in 1986 is in the same "ecosystem" as the project. This expansive theory of standing is contrary to *Lujan*, which requires a plaintiff to show that he uses the specific location where the challenged conduct (or resulting injury) will occur. Moreover, respondents' "ecosystem nexus" theory would uncouple standing from injury-in-fact and would open the courts to suits by plaintiffs who neither viewed any animals nor used any habitat affected by a project. A statute purporting to allow suits on such a basis would breach Article III's fundamental case-or-controversy limitation, and there is no indication that the ESA was meant to do so.[2]

United States because some of its funds are furnished by the United States. The World Bank is not like a domestic government corporation (compare 5 U.S.C. 103); the United States owns less than 20% of its stock and cannot control its decisions. As a result, the Bank is no more an instrumentality of the United States than it is of any other member nation. The Bank's status, and the inapplicability of the ESA, are confirmed by the very statutory provisions respondents cite (Br. 21 n.3), which require the Secretary of the Treasury to instruct the U.S. directors to "urge" the management and other directors of the Bank to assess environmental impacts and "promote" environmental protection. 22 U.S.C. 262m *et seq.*

[2] Contrary to respondents' contention (Br. 27), the fact that the introductory section of the Act expresses a general purpose to conserve the ecosystems on which endangered and threatened species depend (see 16 U.S.C. 1531(b)) does not suggest that Congress intended to confer a private right of action on every individual who might live in or visit an ecosystem. Respondents quote (Br. 27-28) Plowden's testimony that the Picchis-Palcazu Project "could have" an effect on the population of certain species in the area he visited in 1986, because a reduction of the population in a contiguous area reduces the overall gene pool and makes the species more vulnerable to catastrophic events. But see Gov't Br. 22-23 n.12. Such speculation cannot establish standing, especially at the summary judg-

John Grandy. The courts below properly declined to rely on Grandy's activities. See Resp. Br. 24-25. Grandy was unable to describe a single U.S. project in any foreign country, let alone show that any such project had impaired his ability to view wildlife. J.A. 263-267. The most he could say was that "the United States Government contributes money to a lot of things in Kenya," a country he visited. J.A. 265-266.

H. Elliott McClure. Respondents concede (Br. 28-29) that McClure has no geographic nexus to any relevant project. Moreover, aside from two World Bank-funded dams that would not be subject to Section 7 in any event (see page 4, *supra*), respondents rely (Br. 20-21) solely on McClure's reference to a project proposed by the Bureau of Reclamation for the Lower Mekong River Basin in Thailand and Laos. But McClure did not exhibit any personal knowledge of the proposal. Rather, he had read about it in the Bureau's publication *Water for the World* and simply asserted, without citation to supporting evidence, that it would harm endangered wildlife. J.A. 121, 286-287. As the district court recognized (Pet. App. 61a), *Water for the World* stated only that the Bureau had helped develop a plan for such a project; it did not describe the plan, the project's impact on wildlife, possible mitigation measures, the likelihood of construction, or sources of funding. J.A. 63. There accordingly is no basis for finding any harm to listed species from the Bureau's efforts.[3]

---

ment stage. See *Lujan*, 110 S. Ct. at 3189 (distinguishing *United States* v. *SCRAP*, 412 U.S. 669 (1973)). *A fortiori* there is no merit to the even more sweeping submission by amicus American Institute of Biological Sciences (Br. 4-12, 16, 19) that "all persons" have standing to sue to compel compliance with Section 7's consultation requirements with respect to a project located anywhere in the world (without any need to show injury from the project or actual harm to a listed species), on the premise that the ESA recognizes that "everyone" has an interest in "global biodiversity."

[3] Respondents contend (Br. 28-29) that McClure has standing on an "animal nexus" theory, in view of his lifelong study of endangered birds in Southeast Asia. See J.A. 120, 281-282, 285-286.

2. For the foregoing reasons, respondents failed to prove that any of the five members featured in their brief was injured in his or her ability to observe endangered or threatened species as a result of U.S. assistance to a project in a foreign country. That defect alone required summary judgment for the Secretary on standing. But in addition, respondents brought this suit to challenge not the construction of a foreign project, but the Secretary's interpretative regulation. Respondents argue (Br. 30)

McClure's study of birds would not afford him standing here even on that novel theory, because he specifically mentioned only elephants and tigers in connection with the Lower Mekong project. Moreover, although McClure's past study may increase the *intensity* of his personal interest in endangered birds, it does not give him an interest that is different in kind from that of any other member of the public who has an interest in wildlife elsewhere in the world. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

For the same reason, respondents err in relying (Br. 29) on an equally novel "vocational nexus" theory, based on the professional work of McClure and others in studying endangered species. The ESA protects certain species of plants and animals for the common benefit; it does not confer any special rights on persons who happen to study them for a living. Cf. *Lujan*, 110 S. Ct. at 3186. Those who travel to a particular area to observe a particular species, whether vocationally or avocationally, have an equal claim of standing. And persons who do not do so are equally without a basis for standing. *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991), on which respondents rely (Br. 29), was wholly different. There, the challenged regulations directly restricted employees of Title X grantees in performing their jobs, while here the challenged regulation allegedly would affect matters external to the workplace—in the world at large—and would have at most an indirect effect on the members' jobs. Compare *Diamond* v. *Charles*, 476 U.S. 54, 65-67 (1986).

Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986), did not relax standing principles in cases involving animals. Indeed, by quoting the Court's reference to "whale watching," respondents apparently acknowledge (Br. 28) that standing in a case such as this must depend on actual viewing of the affected animals. Although the Court also referred in *Japan Whaling* to the "studying" of whales by members of the plaintiff environmental organizations, there is no indication that the Court intended to recognize standing on the part of individuals whose "studying" does not involve actual observations.

that the regulation "foreclosed the possibility of Section 7 consultations" on the projects discussed above. That argument ignores the point, made in our opening brief (at 25), that their members' visits to the general vicinity of specified projects occurred (if at all) *before* the regulation even went into effect.

Moreover, as we have explained (Gov't Br. 23), even proven instances of past harm would not alone entitle respondents to prospective relief. Apparently recognizing this, respondents suggest (Br. 22, 24, 25) that their members might return to the countries they once visited. But that prospect, and the possibility they would suffer injury if they did return, are entirely speculative on the present record. For example, although Kelly said she intended to return to Egypt, she did not say when or explain how rehabilitation of Aswan Dam turbines would affect her ability to observe crocodiles in the future, any more than in the past. J.A. 101; Gov't Br. 20. Skilbred had not returned to Sri Lanka between the time of her trip in 1981-1982 and her deposition in December 1988. Although respondents contend that Skilbred expressed a "fixed intention" to return (Br. 24), the testimony they cite contains only the vague statement that she "intend[ed] to visit areas where U.S. projects may be taking place sometime in the future," including "[t]he Mahaweli area" (J.A. 320-321; see also J.A. 144, 145); and Skilbred also testified that she did *not* know when she would return, except that it would not be in the next year because of civil war in Sri Lanka. J.A. 318. For the remaining three of respondents' members, the prospect of future harm was even more speculative.[4]

[4] McClure testified that he had no plans to travel to Thailand again, in light of his age and financial status. J.A. 286. Grandy testified that he intended to go back to Kenya in 1989 and would "look for" development projects there and "find out who funds them," and that he intended to return to Botswana but planned to visit only a World Bank project. J.A. 266-277. Plowden testified that he "would like to visit" the Picchis-Palcazu Project "in the future," but he did not have plans to do so; he stated only that he was planning to go back to the Amazon the next year, and that

We do not argue that, as respondents put it (Br. 26 n.6), their members must "constantly camp out at a project site to possess standing." But under this Court's cases, respondents must show that future visits by their members are sufficiently imminent and definite—and that U.S.-assisted projects are sufficiently likely to harm their ability to view endangered species at project sites—that whatever injury they claim is "certainly impending," *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1723, 1725 (1990), or "real and immediate," *Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983). Respondents do not suggest that they satisfied this test.

3. Respondents also do not come to grips with the fact that any future injury to their members' ability to view endangered species in a foreign country could not be fairly traced to the Secretary's interpretative regulation. Other federal agencies are not bound by the Secretary's view of the geographic reach of Section 7(a)(2).[5] It therefore is not surprising that respondents do not cite a single instance while the pre-1986 regulation was in effect in which an action agency felt compelled to follow the Secretary's initial interpretation that Section 7(a)(2)

---

he would also visit the project "if possible." J.A. 295. Moreover, Plowden testified to his understanding that all AID funding for the project had already terminated (C.A. App. 123-125); and as we have explained (Gov't Br. 7 n.2), AID's field activity on the project in fact *had* ceased by 1988, and its participation ceased altogether in 1990. See Exh. 1 to Mem. in Support of Def's Cross Mot. for Sum. Judgment.

[5] Respondents mischaracterize (Br. 33 n.9) our argument to be that "federal action agencies could simply ignore the results of a Section 7 consultation." The Secretary fully recognizes that where consultation is required, an agency may not ignore the results. On the other hand, the statutory text makes plain that the obligation under Section 7(a)(2) to avoid jeopardy to listed species falls on the action agency, which is ultimately responsible for deciding what is required by that Section, including whether to consult with the Secretary about a particular project, at home or abroad. As one of respondents' principal witnesses, John Grandy, acknowledged (J.A. 267-268), the Secretary has no authority to order another agency to initiate consultation. See Gov't Br. 25.

applied to projects in other countries. There accordingly is no reason to believe that future projects would be affected by a district court order requiring the Secretary to revert to that earlier interpretation.[6]

Moreover, respondents concede (Br. 47) that "[a]pplying Section 7 consultations to federal agency actions that may affect listed species in other nations will not restrict the ability of foreign sovereigns to plan their own development strategies." Yet they fail to explain how any harm that might result to endangered species if a foreign sovereign does proceed could nonetheless fairly be traced to the Secretary's regulation. Nor do they explain how a U.S. court could afford relief that would redress any adverse effects of projects carried out by foreign governments in those circumstances. Respondents thus ignore

---

[6] In a belated attempt to show redressability, respondents express confidence (Br. 34) that if this Court affirms the judgment below, action agencies will consult with FWS under Section 7(a)(2) about foreign projects. This argument is pure bootstrap. If this Court reaches the merits and affirms, other federal agencies will have little choice but to follow its holding. But they would do so because of the precedential effect and practical finality of this Court's rulings on legal issues, not because of any res judicata effect of the judgment, since only the Secretary is a party. Cf. 5 U.S.C. 702 (United States may be named as a party, but an injunctive order must specify the federal officers who are responsible for compliance). Redressability therefore must be analyzed as of the time respondents filed suit and focus on whether a district court order would bind action agencies.

Of course, action agencies may voluntarily consult with FWS on overseas project, as AID did on an informal basis for the Mahaweli Project. J.A. 78-80, 210-213. While respondents cite (Br. 33-34) that voluntary consultation in an effort to show redressability, it in fact undercuts their assumption that the 1986 regulation will cause agencies to overlook harm to endangered species in planning overseas projects. FWS's willingness to assist action agencies in evaluating overseas projects also exposes the error in respondents' attempt (Br. 31) to justify their decision to sue the Secretary, rather than action agencies, on the ground that the Secretary "refuses to consult" with other agencies.

critical breaks in the chains of causation and redressability that are necessary for their standing. Gov't Br. 26-28.[7]

C. Finally, respondents argue (Br. 16-17, 30) that established standing requirements should be relaxed here. Specifically, respondents contend that the ESA defines a risk of harm to an endangered species as an "injury" to respondents, and gives them standing to sue. While it may be true that a risk of adverse effect triggers an agency's duty to initiate consultation with FWS under Section 7(a)(2), respondents' argument begs the question of *who* may sue over a failure to consult. It would be quite odd to recognize a risk to animals as an actual injury to a human plaintiff, much less to plaintiffs with the attenuated connection to the animals that respond-

---

[7] Amici Texas, *et al.*, contend (Br. 15-16) that the causation and redressability issues should be ignored insofar as the actions of foreign governments are concerned because the Court held that the APA afforded the plaintiffs in *Japan Whaling* a cause of action. 478 U.S. at 231 n.4. There, the plaintiffs challenged the Secretary of Commerce's failure to certify that Japanese whalers were engaging in conduct that diminished the effectiveness of a convention, which would have triggered a reduction of at least 50% in Japan's fishery allocation within the United States. *Id.* at 226. The Court did not mention the causation and redressability elements of standing; it addressed only the text of the APA. Although the government referred in passing to those elements of standing in a footnote in its reply brief in *Japan Whaling* (at 17-18 n.20), stating that the uncertainty about Japan's response made the plaintiffs' standing "dubious," the government did not separately press a standing argument. *Japan Whaling* therefore should not be understood to have dispensed, *sub silentio*, with the causation and redressability elements of standing in this setting (*Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974); *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-1065 (1990)), especially since those elements have been repeatedly reaffirmed since *Japan Whaling*. See Gov't Br. 17. Moreover, *Japan Whaling* involved affirmative sanctions that were enacted for the specific purpose and with the firm expectation of causing a foreign sovereign to adhere to restrictions on whaling. 478 U.S. at 225-226. The ESA contains no comparable determination by Congress of the likely effect on a foreign sovereign of withholding assistance. Compare *Allen* v. *Wright*, 468 U.S. 737, 756-761 (1984). Accordingly, in order to find that respondents have standing, the Court itself would have to assess the likely response of foreign governments in this diplomatically sensitive area. See Gov't Br. 27.

ents claim here. Nothing in the ESA suggests that Congress purported to adopt that bizarre view of injury, and thereby greatly expand the class of potential plaintiffs beyond the normal strictures of Article III. The entire focus of Section 7(a)(2) is on protection for listed species, not the interests of human beings. See Gov't Br. 28.[8] Similarly, nothing in the ESA's citizen-suit provision, which permits "any person" to sue in certain circumstances, 16 U.S.C. 1540(g)(1), purports to create a legal right, "the invasion of which creates standing." See *Valley Forge*, 454 U.S. at 488 n.24 (APA provision permitting any person aggrieved by agency action to sue does not create legal rights).[9]

In any event, respondents' argument overlooks that what is challenged here is not an action agency's failure to consult, but the Secretary's interpretative regulation. Congress plainly did not define an allegedly erroneous interpretation in an advisory regulation as "injury" that would confer standing on respondents to challenge it, divorced from any concrete claim of harm.[10]

---

[8] *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), relied upon by respondents (Br. 16-17), involved a statute that created a personal right to truthful information about available housing. Section 7(a)(2) consultation, by contrast, is not directed at providing information to members of the public, since it occurs between agencies without any requirement for public input.

[9] We have shown (Gov't Br. 29 n.18) that the citizen suit provision does not cover this case, because the Secretary's interpretation, even if erroneous, is not a "violation" of the Act within the meaning of 16 U.S.C. 1540(g)(1)(A). Respondents suggest (Br. 8) that the 1986 regulation can be challenged under 16 U.S.C. 1540(g)(1)(C), which applies when "there is alleged a failure of the Secretary to perform any act or duty under Section 4 of this title which is not discretionary." This case, however, arises under Section 7, not Section 4. But even if the citizen suit provision did cover this suit, such a provision cannot, as respondents acknowledge (Br. 17-18), relax constitutional standing requirements. See *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

[10] Respondents rely (Br. 18) on a statement in *Lujan*, 110 S. Ct. at 3190, that "[s]ome statutes permit broad regulations to serve as

II. We have shown (Gov't Br. 31-50) that the court of appeals' holding on the merits contravenes the established presumption that Acts of Congress do not apply overseas, absent clearly expressed legislative intention to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). Respondents, like the court below, do not point to any plain statement in the statutory text or legislative history that Section 7(a)(2) applies to actions in foreign countries. In fact, Section 7(a)(2), and Section 7 as a whole, have a domestic focus. Respondents rely on inferences drawn from other provisions of the ESA and statements in the legislative history that do not pertain to Section 7. Those materials are wholly insufficient to overcome the presumption against extraterritoriality and indeed underscore the domestic focus of Section 7(a)(2). Moreover, significant adverse consequences would follow from application of Section 7's rigid standards and ill-suited procedures overseas, where the project, territory, natural resources, and affected species are all under the primary jurisdiction and laws of a foreign government. Gov't Br. 31-33. For these reasons, the Secretary's interpretation of Section 7(a)(2) not to apply in foreign countries is, at the very least, reasonable, and should be sustained under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. Respondents fail to acknowledge that the text of Section 7(a)(2) itself has a domestic focus, since it refers to "affected States" but not foreign countries. Indeed, respondents do not contest that their position requires the surprising conclusion that Congress, without saying so, gave a vastly different geographic reach to two different parts of a single sentence, by confining its protection for critical habitat to the United States but extending its protection for species that depend on such habitat to foreign countries. Gov't Br. 36-37. Instead,

---

the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." But the ESA, unlike some statutes, does not authorize immediate challenges to regulations. Compare 33 U.S.C. 1369(b); 42 U.S.C. 7607(b).

respondents attempt to support this unusual interpretation (Br. 44-45) on the ground that under a different provision of the Act, Section 4, critical habitat is designated using somewhat different standards than those that apply to listing of species. See 16 U.S.C. 1533(b)(1)(A) and (2). But this difference is entirely irrelevant to application of the Section 7(a)(2) duty, which applies to both the species and its critical habitat.

Respondents contend (Br. 36), however, that the references in Section 7(a)(2) to "any action" and "any endangered species" indicate an intent to apply it to projects in foreign countries. Even the court below recognized that the mere use of such a general term as "any" is insufficient to extend a statute's coverage abroad. Pet. App. 12a-13a; see *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949). That is especially so here, since any such inference is negated by Section 7(a)(2)'s reference to "affected States."

Contrary to respondents' contention (Br. 4, 36), the fact that Section 4 provides for listing of endangered or threatened species whose habitat is in foreign countries has no bearing on the scope of Section 7(a)(2). Those listings are necessary for administration of the ESA's distinct prohibitions against trading in listed species—prohibitions that, unlike Section 7(a)(2), have an *express* extraterritorial reach. See page 16, *infra*. Moreover, respondents' reliance on a supposed linkage between Section 4 and Section 7(a)(2)'s reference to "any endangered species" overlooks that this case turns on the meaning of the phrase "any action" (which respondents contend includes "action[s]" abroad), not "any endangered species." See Gov't Br. 35 n.23. While a species whose normal range is outside the United States may be protected from the effects of a domestic project, that unremarkable consequence of domestic regulation does not imply that projects that are themselves outside the United States are covered by Section 7. For that result to obtain, some clear statement of congressional purpose to extend its standards to overseas projects is required, and none has been identified. To the contrary, Section

7(a)(2) requires an agency to "insure" that "any action" it authorizes, funds, or carries out will not be likely to jeopardize a listed species, yet an agency of the United States Government cannot "insure" that result for a project undertaken by a foreign government within its own borders. See Gov't Br. 36 n.24.[11]

---

[11] We also have shown (Gov't Br. 37-39) that the domestic focus of Section 7(a)(2) is confirmed by the structure of Section 7 as a whole, which provides, under amendments adopted in 1978, for exemptions from Section 7(a)(2) under standards that themselves have a domestic focus. Contrary to respondents' contention (Br. 37-38), the references in the exemption provisions to the Governor of the State, "if any," where an agency action will occur (16 U.S.C. 1536(g)(1) and (2)(B)), and the provision for judicial review of exemption decisions concerning actions "outside of any circuit" (16 U.S.C. 1536(n)), do not imply that projects in foreign countries are covered. Rather, they suggest coverage of actions on the Outer Continental Shelf and the high seas, which would not be subject to foreign laws and governmental authority. See Gov't Br. 38 n.28. Moreover, *Arabian American Oil* makes clear that an inference drawn from language such as this falls far short of the clear statement necessary to overcome the presumption against extending U.S. laws into foreign countries. 111 S. Ct. at 1233-1234.

The Zoological Parks amici claim (Br. 24-26) that it is illogical for the Secretary to interpret Section 7(a)(2) to apply on the high seas but not in foreign countries. Of course, coverage of the high seas is not at issue here. In any event, this contention overlooks Section 7(o) of the Act, 16 U.S.C. 1536(o), which provides that certain actions permitted by Section 7's exemption or incidental-taking provisions (16 U.S.C. 1536(b)(4)(iv) and (h)) shall not constitute prohibited "takings" of protected species, "notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C)." Subsection 1538(a)(1)(C) contains the prohibition against taking endangered species "upon the high seas." Thus, Section 7 contemplates coverage of at least some actions on the high seas. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-441 (1989). Section 7 contains no similar reference to activities in foreign countries. Indeed, it is significant that the prohibition in 16 U.S.C. 1538(a)(1) against the taking of protected species by persons subject to U.S. jurisdiction applies on the high seas but *not* in foreign countries. This reinforces the conclusion that Congress drew the same line in Section 7(a)(2).

Amici also overlook that the United States has sovereign rights in various marine species on the high seas even beyond its terri-

B. As respondents note (Br. 3-4, 37), the ESA reflects concern about wildlife worldwide. But that scarcely suggests that every provision of the Act applies worldwide. To the contrary, as we have explained (Gov't Br. 39-41), the Act makes clear that Congress intended to address the problem of protecting species in foreign countries by the accustomed means of international agreements and cooperation, rather than unilateral extension of U.S. law onto foreign soil. And where Congress intended to depart from that approach, it expressly so provided—*e.g.*, by extending into foreign countries the prohibition against commerce in protected species by persons subject to U.S. jurisdiction. 16 U.S.C. 1532(9), 1538(a)(1)(E) and (F). The absence of any comparable expression of intent to extend the restrictions in Section 7(a)(2) into foreign countries therefore is all the more telling. It also is telling that no legislator, committee, or witness ever suggested when Section 7(a)(2) was enacted that placing statutory restrictions on the activities of foreign governments that receive assistance from the United States would be an appropriate means of responding to concerns about foreign wildlife.[12]

---

torial jurisdiction. 16 U.S.C. 1811 (asserting jurisdiction over all fish within 200-mile "fishery conservation zone" and all anadromous species throughout their migratory range, except when they are within another nation's fishery conservation zone); see also Presidential Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) (asserting various sovereign rights in 200-mile zone).

[12] Respondents cite (Br. 40) a statement by Congressman Dingell in favor of having "a management program that is going to maintain these populations around the world." However, the context shows that he was speaking not about applying Section 7 overseas, but about providing "counterpart funds" under 16 U.S.C. 1537(a), to "encourage management in other countries to keep these population levels up." *Hearings on H.R. 37 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 349 (1973). As we have shown (Gov't Br. 43-44), all other references in the legislative history to international aspects of species protection were in terms of encouraging cooperation and fulfilling treaty commitments, while all references to Section 7(a)(2) were limited to domestic projects. See also S.

Respondents assert (Br. 41-44) that Congress ratified the initial agency interpretation that Section 7(a)(2) applies to projects in foreign countries. But they cite no evidence that Congress was aware of the relevant provision in the 1978 regulations, much less endorsed it. Gov't Br. 45; cf. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). The absence of any such evidence compels rejection of any ratification argument here, because only a clear statement of intent by Congress itself can overcome the presumption against extraterritorial application. Respondents' argument fails even on its own terms, however, because the exemption provisions added to Section 7 in 1978 themselves have a domestic focus. See note 11, *supra*.[13]

Rep. No. 307, 93d Cong., 1st Sess. 3 (1973) (ESA must provide protection "throughout the nation" for endangered or threatened species). There was no suggestion that fulfillment of any treaty commitments of the United States required application of the strict statutory standards in Section 7(a)(2) to projects undertaken by a foreign sovereign that receives assistance from the United States. Congress presumably would have expected such projects to be governed by the treaty commitments (and domestic laws) of the foreign sovereign.

[13] Amici City of Austin, *et al.*, rely (Br. 25-26) on statements in subsequent committee reports that, in their view, criticize the 1986 regulations for failing to interpret Section 7(a)(2) to apply in other countries. For instance, the House Appropriations Committee (which is not charged with substantive oversight of the ESA) stated: "The Committee also expects [FWS] to continue to provide consultations on endangered species to United States agencies dispensing foreign assistance." H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). This passage could well refer to voluntary consultation. See note 6, *supra*. The Senate Report accompanying the Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, Tit. I, 102 Stat. 2306-2307, likewise does not expressly refer to the controversy concerning extraterritorial application of Section 7(a)(2), and there is no indication that Congress as a whole was aware of that controversy when it voted on the 1988 amendments, which did not affect Section 7. Even in an ordinary case of statutory construction (not involving the presumption against extraterritoriality), the Court has cautioned that such "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117

The contention by amici City of Austin, *et al.* (Br. 4-10) that the Secretary's interpretation will frustrate the purposes of the Act is entirely unwarranted. Amici assume (Br. 9) that if U.S. law does not apply, foreign species will go unprotected, and U.S. agencies will be "free to do whatever they please" in foreign countries. This chauvinistic view ignores the fact that other nations have their own treaty commitments and statutory regimes to protect wildlife within their borders, to which U.S.-supported projects will presumably be subject. If those commitments and regimes are deemed inadequate, the approach contemplated by the ESA is for the United States to enter into appropriate international agreements, 16 U.S.C. 1531(a)(4), or for the Secretary, "through the Secretary of State," to "encourage foreign countries to provide for the conservation of * * * endangered species," 16 U.S.C. 1537(b). See Gov't Br. 39-41, 41-42, 47.[14]

C. Amici (but not respondents) urge the Court to carve out an exception to the presumption against extraterritoriality where environmental statutes are concerned. Zoological Parks Br. 9-23; Ecotropica Br. 5-18.[15] But they

---

(1980); see also *TVA* v. *Hill*, 437 U.S. 153, 192 (1978) (rejecting post hoc committee statement about ESA because "there is no indictation that Congress as a whole was aware of [it]").

[14] Similarly, the absence of a requirement for formal interagency consultation under the particular procedures of Section 7 does not imply that federal agencies will ignore the possible impact of foreign projects on listed species. See Gov't Br. 22 (describing AID environmental assessments); City of Austin Br. 1a-2a (describing USDA environmental assessment of pesticide spraying in Guatemala (discussed by amici (Br. 8)), which found no effect on endangered warbler).

[15] Respondents contend (Br. 48) that the presumption should not apply because the consultation requirement is merely "an effort by Congress to control the internal operating procedures of its government." This argument ignores the fact that consultation about an overseas project would focus not on agency operating procedures, but on whether the project itself will have an adverse effect on wildlife in the foreign country. The extraterritorial aspect of this inquiry is not diminished if the affected species migrates to the United States, since both the project that the agency would be required to analyze and its potential impacts on the environ-

cite no support for such an exception, and the cases that have considered the possible extraterritorial scope of U.S. environmental laws have uniformly recognized the applicability of the presumption. See Gov't Br. 34 n.22; see also *Environmental Defense Fund* v. *Massey*, Civ. No. 91-1068 (D.D.C. Aug. 29, 1991) (NEPA does not apply in Antarctica). Even the court below recognized that the presumption applies here. Pet. App. 19a.

Indeed, the very considerations on which amici rely weigh strongly against the exception they urge. The fact that an environmental problem abroad may affect many nations (Ecotropica Br. 16-18; Zoological Parks Br. 11-13) should make the courts all the more reluctant to extend U.S. law abroad to address it; if all nations did the same, a cacophony of regulatory standards would result. The numerous treaties amici cite (Zoological Parks Br. 13-16) show that the United States and other nations have instead chosen to address these issues through the usual method of diplomacy, with a view toward achieving consensus on either the applicable standards or the manner in which divergent standards may be respected and harmonized. As we have pointed out (Gov't Br. 48), Congress recently endorsed that approach specifically with respect to protection for threatened species and biodiversity.

Finally, the fact that Congress has on occasion departed from that approach by expressly imposing restrictions on U.S. Government activities and financial assistance abroad (Zoological Parks Br. 8) shows that Congress knows how to do so when it deems it advisable, after weighing the possible impact on relations between the United States and foreign governments and the wisdom of so limiting

---

ment would occur inside the foreign country. More fundamentally, however, consultation is only an adjunct to the strict substantive duty to "insure" that actions are not likely to jeopardize listed species. If Section 7(a)(2) applies, the agency would have to withdraw from any project when it could not insure such protections inside the foreign country. *TVA* v. *Hill*, 437 U.S. at 193-195. Clearly, Section 7 does far more than "assure regularity in the practice of government," as the Zoological Parks amici contend (Br. 9).

the flexibility of the Executive's conduct of foreign affairs. Gov't Br. 31-33, 47-48; compare *Arabian American Oil*, 111 S. Ct. at 1235-1236.[16] As a result, Congress's actions in this area have conformed to the presumption against extraterritorial application of federal statutes and to the need for a clear statement to overcome that presumption. These principles "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). Section 7(a)(2) contains no such clear statement, and therefore furnishes no assurance that Congress has in fact faced and chosen to accept the myriad difficulties that would result from applying that Section's rigid substantive standards and elaborate procedural provisions to projects in foreign countries.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

THOMAS L. SANSONETTI
Solicitor
Department of the Interior

OCTOBER 1991

---

[16] Respondents err in asserting (Br. 46) that their interpretation of Section 7 "will have no impact on the sovereign powers of foreign governments." As the State Department made clear in protesting the Secretary's initial interpretation, "[a]n analysis by a United States agency of the impacts on endangered and threatened species in, and policy options available to, foreign countries may be perceived by them as an unwarranted interference in matters within their jurisdiction." J.A. 189; see also *NRDC* v. *NRC*, 647 F.2d 1345, 1356 (D.C. Cir. 1981) (examining another nation's project pursuant to U.S. environmental law will likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own").

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45097